United States Court of Appeals

for the

Seventh Circuit

Case No. 10-1973

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, *et al.*,

Plaintiffs-Appellees,

– v. –

BARACK OBAMA, President of the United States, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 3:08-00588
THE HONORABLE BARBARA B. CRABB

BRIEF OF *AMICUS CURIAE* CENTER FOR INQUIRY IN SUPPORT OF APPELLEES

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Dated October 7, 2010

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INTEREST OF THE *AMICUS CURIAE*

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to fostering a secular society based on science, reason, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amicus* submits this brief because the boundaries between government and religion are an essential part of our free society, and because ensuring that government does not impermissibly endorse religion and particular religious practices is critical to maintaining those boundaries.

SUMMARY OF ARGUMENT

Every year since 1952, the President of the United States has declared a National Day of Prayer pursuant to federal legislative mandate. *See* 36 U.S.C. § 119 (hereinafter referred to as "section 119").[1] The National Day of Prayer is widely recognized as an annual call by the President for the American people to engage in the inherently religious activity of prayer. The intent and effect of the Congressional statute mandating the National Day of Prayer is to influence individuals' decisions regarding whether and when to pray. Plaintiff-Appellees Freedom From Religion Foundation, Inc., *et al*. ("FFRF") contend, and the district court below agreed,[2] that because section 119 is an explicit call by government for religious exercise on the part of citizens, the statute violates the Establishment Clause of the First Amendment.

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[1] In 1952, Congress first directed the President to select and declare one day each year as a National Day of Prayer. *See* Pub. L. No. 324, Ch. 216, 66 Stat. 64. The statute was amended in 1988 to designate the first Thursday in May as the National Day of Prayer. *See* Pub. L. No. 100-307, 102 Stat. 456. In 1998, Congress codified various laws related to national observances and ceremonies without substantively changing their content. The statute currently in effect reads as follows: "The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119.

[2] *See* District Court Opinion and Order, dated April 15, 2010 (hereinafter referred to as "*Dist. Ct. Op.*").

Defendants-Appellants Barack Obama, President of the United States, *et al*. (the "Government") and *amici* argue that the district court erred in finding an Establishment Clause violation, in part because the nation's purportedly long and unambiguous history of prayer proclamations allegedly immunizes section 119 from constitutional challenge. The Government and *amici* rely heavily on the Supreme Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), a *sui generis* case in which the Court declined to find the Nebraska legislature's practice of opening sessions with prayer unconstitutional under the Court's usual Establishment Clause analyses, in part because of the practice's "unique history." *Id.* at 791. In particular, the Court noted that state legislatures' long history of invoking divine guidance made the practice "part of the fabric of our society" and "simply a tolerable acknowledgment of beliefs widely held among many people in this country." *Id.* at 792.

The Court's analysis in *Marsh* has since been widely described, in both court opinions and in legal scholarship, as an example of "ceremonial deism."[3] Although the Establishment Clause forbids government from favoring

[3] *See, e.g., Allegheny County v. Pittsburgh ACLU*, 492 U.S. 573, 595-96 n. 46 (1989); *see also, e.g.,* John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L. L. Rev. 563, 578 (2003); *see also, e.g.,* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 U.C.L.A. L. Rev. 1545, 1553 (2010).

religion over non-religion,[4] the courts have occasionally held or suggested that certain government practices that favor religion or employ religious language are constitutionally permissible under the rubric of ceremonial deism.

For the reasons outlined below, the Center for Inquiry contends that the Supreme Court's ceremonial deism analysis in *Marsh* is inapplicable to the facts and circumstances of this case; that if the ceremonial deism analysis in *Marsh* were applicable in this case, it would fail to uphold section 119 as an instance of constitutionally permissible ceremonial deism; and that other alternative rationales for upholding the statute as an instance of ceremonial deism fail. The Center for Inquiry further asserts that recent changes in the nation's religious demographics severely undercut the Government's heavy reliance upon *Marsh* to justify the statute's constitutionality.

ARGUMENT

I. THE STATUTE IS NOT A CONSTITUTIONALLY PERMISSIBLE INSTANCE OF MERE 'CEREMONIAL DEISM.'

The courts have limited the doctrine of ceremonial deism to a small number of highly specific contexts. In these particular contexts, the courts have either held or suggested in dicta that a government religious practice is

[4] *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (*quoting Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)) ("[T]he "First Amendment mandates government neutrality between religion and religion, and between religion and non-religion.").

constitutional, despite the practice's *prima facie* violation of the Establishment Clause, on the grounds that the practice is longstanding and its religious impact is minimal. An examination of the reasoning employed in instances of constitutionally permissible ceremonial deism, however, reveals that section 119 cannot be justified as an example of ceremonial deism.

The phrase "ceremonial deism" first appears in legal literature in a 1962 lecture by Yale Law School Dean Eugene Rostow. Rostrow defined "ceremonial deism" as "a class of public activity which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional." Sutherland Book Review, 40 Ind. L. J. 83, 86 n. 7 (1965). Since then the courts have employed the concept of "ceremonial deism" in a very limited number of cases.

The Supreme Court's decision in *Marsh* is the single instance in which the Court employed the concept of ceremonial deism to uphold government sponsorship of religion, namely the use of taxpayer-funded chaplains to deliver prayers at state legislative sessions. The Court in *Marsh* grounded its *sui generis* decision in the long and unique history surrounding this practice, despite the practice's apparent conflict with the Court's Establishment Clause precedents.[5] Although the Court did not use the phrase "ceremonial deism" in *Marsh*, its

[5] *See also Allegheny*, 492 U.S. at 595 n. 46 (1989) (noting that in *Marsh*, "the Court sustained the practice of legislative prayer based on its unique history").

opinion is widely regarded as an instance of the use of that concept. *See supra* n. 3.

Supreme Court Justices have used the specific phrase "ceremonial deism" in only a few opinions. In none of those instances did the Court hold that the practice being challenged was an example of ceremonial deism. In two cases, the Court distinguished a challenged nativity scene from examples of ceremonial deism. *See Lynch v. Donnelly*, 465 U.S. 668, 671, 716 (1984) (Brennan, J. dissenting, contrasting a crèche the Court majority found constitutional with examples of "ceremonial deism," described as including references to "God" in the national motto and in the Pledge of Allegiance); *see also Allegheny*, 492 U.S. at 603 (holding that the Court need not consider the constitutionality of ceremonial deism because the challenged crèche was obviously distinguishable from references to "God" in the national motto and the Pledge of Allegiance). An additional case, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004), involved a challenge to Congress's addition of the phrase "under God" to the Pledge of Allegiance. Although the Court dismissed the challenge on standing grounds, several justices concluded that the phrase "under God" was an example of constitutionally permissible ceremonial deism. *Id.* at 18 (Rehnquist, C.J., concurring); *id.* at 37 (O'Connor, J., concurring).

This Court employed the doctrine of ceremonial deism when observing in *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir.1986), that both "In God We Trust" and Christmas trees are secular, having lost their original religious significance. This Court also made reference to "ceremonial deism" in holding that public schools may lead pupils in daily recitations of the Pledge of Allegiance without violating the Establishment Clause, so long as pupils are free not to participate. *See Sherman v. Community Consol. School Dist. 21 of Wheeling Township*, 980 F. 2d 437, 445-48 (7th Cir. 1992).

In these cases and in others like them, the courts have offered a range of varying and sometimes overlapping justifications for condoning apparent Establishment Clause violations under the rubric of "ceremonial deism." The Government and *amici* rely principally on the Supreme Court's focus on the historical longevity of government practices in *Marsh*. In addition, the courts have offered a handful of alternative rationales for condoning apparent Establishment Clause violations as examples of ceremonial deism.

An examination of each of the rationales underlying the various instances of ceremonial deism, however, demonstrates that none of the purported rationales for condoning government practices that would otherwise constitute Establishment Clause violations can justify section 119 as an example of permissible ceremonial deism.

A. The Statute Is Not Supported by the Supreme Court's *Sui Generis* Reasoning in *Marsh*.

The Supreme Court in *Marsh* sanctioned an instance of ceremonial deism—the opening of state legislative sessions with prayer—in part because the government practice at issue was in use for so long, and was so widespread, that in the Court's judgment it had become an acceptable part of the fabric of our society.

The Court's decision in *Marsh* was *sui generis*; although the Court has discussed *Marsh* in subsequent cases, it has not relied on *Marsh* to justify similar practices. *Coles ex rel. Coles v. Cleveland Board of Education*, 171 F.3d 369, 381 (6th Cir. 1999) (holding that prayers opening school board meetings violate the Establishment Clause and that "[a]s far as *Marsh* is concerned, there are no subsequent Supreme Court cases. *Marsh* is one-of-a-kind."). *See also McCreary*, 545 U.S. at 860 (describing *Marsh* as a "special instanc[e]" in which the Court condoned governmental action "even where its manifest purpose was presumably religious.").

The *sui generis* nature of the Court's decision in *Marsh* cautions against extending its holding to other cases involving other facts and circumstances. Despite the fact that the Supreme Court has limited *Marsh* to its unique set of facts and has not relied on *Marsh* to justify other practices, the Government and *amici* would have this Court extend *Marsh* to cover the dissimilar practices at issue in this case, merely because the government prayer proclamations

purportedly have a widespread and long history of use. A careful examination of *Marsh* reveals, however, that its holding cannot justify section 119 as an instance of ceremonial deism.

1. The Historical Longevity Analysis in *Marsh* is Inapplicable to This Case.

The Supreme Court's *sui generis* holding in *Marsh* is inapposite to this case for a number of reasons. First and most obviously, *Marsh* did not address the constitutionality of the practice at issue in this case, i.e., the Government's exhortation of citizens to engage in the quintessentially religious activity of prayer. *Marsh* concerned not the permissibility of government's use of its authority to influence individuals' decisions about whether and when to pray, but the permissibility of state legislative assemblies' internal decision to engage in prayer. Indeed, the Supreme Court has distinguished the National Day of Prayer from permissible legislative prayer because the latter "does not urge citizens to engage in religious practices." *Allegheny*, 492 U.S. at 603 n. 52. *See also Van Zandt v. Thompson*, 839 F. 2d 1215, 1219 (7th Cir. 1998) ("Based on *Marsh* we are inclined to view a legislature's internal spiritual practices as a special case.").

In addition, the Government and *amici's* attempt to rely on a purportedly unambiguous and unbroken history of thanksgiving prayer proclamations to justify section 119 under *Marsh* suffers a fatal flaw. As the district court clearly explained, the constitutionality of prayer proclamations is not

at issue in this case. "Although plaintiffs sought a declaration that all presidential 'prayer proclamations' violate the establishment clause," the court "dismissed this claim" for lack of standing. *Dist. Ct. Op.* at 51. Thus, the issue in this case is not whether presidential prayer proclamations themselves are constitutional, but whether section 119 is constitutional. *Id*.

As the district court elaborated, there is no longstanding historical tradition of Congressional statutes designed to influence individuals' decisions regarding whether and when to engage in religious practices such as prayer:

> No tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date. It was not until 1952 that Congress established a legislatively mandated National Day of Prayer; it was not until 1988 that Congress made the National Day of Prayer a fixed, annual event. Defendants identify no other instance in which Congress has endorsed a particular religious practice in a statute.

Id. Thus, the Supreme Court's holding in *Marsh*, which was dependent upon the ubiquitous and unbroken historical tradition surrounding the challenged practice, is inapposite to this case.[6]

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[6] The Government and *amici* make much of Justice O'Connor's observation in dicta that the "history and ubiquity" of the "declaration of Thanksgiving as a public holiday" immunizes the practice from further Establishment Clause analysis. *Lynch,* 465 U.S. at 688-90 (O'Connor, J., concurring). As noted above, however, it is section 119 and its mandated exhortation to engage in religious worship, and not the declaration of Thanksgiving as a holiday, that is at issue in this case. In addition, section 119 is distinguishable from Thanksgiving proclamations in at least three additional respects. First, Thanksgiving proclamations themselves serve the "obvious secular purpose of giving thanks." *Dist. Ct. Op.* at 51. Second, a President's statements about his personal beliefs about prayer are less likely to be

2. Here, Unlike in *Marsh*, the History Surrounding the Challenged Practice Does Not Unambiguously Favor the Practice's Constitutionality.

As the district court noted, even if the history of the early Presidents' thanksgiving and prayer proclamations were relevant to the constitutionality of section 119, that history "does not point in one direction," unlike the historical practices at issue in *Marsh*. *Id.* at 52.

Contrary to the Government and *amici's* assertions, support for thanksgiving prayer proclamations among the early Presidents is anything but uniform. Although President Washington may have supported thanksgiving proclamations, Presidents Jefferson and Madison did not. "President Jefferson . . . steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses." *Lee v. Weisman*, 505 U.S. 577, 623 (1992) (Souter, J., concurring). To Jefferson's thinking, "[e]very religious society has a right to determine for itself the times for [prayers] and the objects proper for them according to their own particular tenets; and this right can

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viewed as an official endorsement than a statute encouraging all citizens to pray. *Id*. at 52, *citing Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) (contrasting "Thanksgiving Day proclamations and inaugural speeches," which "have embedded within them the inherently personal views of the speaker as an individual member of the polity" with "permanent" messages that "amalgamat[e] otherwise discordant individual views into a collective statement of government approval"). Third, unlike section 119, Thanksgiving proclamations are not an attempt to help particular religious groups organize. *Dist. Ct. Op.* at 52.

never be safer than in their own hands where the Constitution has deposited it . . . [C]ivil powers alone have been given to the [federal government], and no authority to direct the religious exercises of [its] constituents." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904), *quoted in Wallace v. Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting).

President Madison objected to thanksgiving proclamations because they "seem to imply and certainly nourish a national religion," 3 The Papers of James Madison 560 (1962), *quoted in* Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent*, 90 (Oxford University Press, New York: 2000) (emphasis in original). Madison elaborated that such proclamations tend "to narrow the recommendation to the standard of the predominant sect." *Madison's Detached Memoranda*, 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946), *quoted in Lee*, 505 U.S. at 617 (Souter, J., concurring). Although Madison "gave in to demands to proclaim days of thanksgiving" during the War of 1812, *Davis* at 90, he later regretted having done so. *McCreary*, 545 U.S. at 879 n. 25.

Like Presidents Jefferson and Madison, President Jackson also refused to issue thanksgiving prayer proclamations. He wrote that such proclamations might "disturb the security which religion now enjoys in this country in its complete separation from the political concerns of the General Government."

Correspondence of Andrew Jackson (1929), *quoted in* John Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation*, 111 (Random House, New York: 2006).

The early Presidents' inconsistent attitudes toward prayer proclamations are clearly at odds with the "unambiguous and unbroken history" of support for the ceremonial deistic practice under challenge in *Marsh.* 463 U.S. at 792. The Government therefore cannot rely on historical tradition to justify section 119 under the Supreme Court's ruling in *Marsh*.

B. Alternative Rationales for Applying the 'Ceremonial Deism' Doctrine Fail in This Case.

In addition to the Supreme Court's reference in *Marsh* to long historical tradition, the courts have offered a range of alternative justifications for suggesting that apparent Establishment Clause violations are examples of constitutionally permissible ceremonial deism. An examination of the rationales underlying the various alternative justifications, however, demonstrates that like the purported justification from historical longevity in *Marsh*, the alternative rationales do not apply in this case.

The courts have relied upon three alternative rationales to suggest that certain government practices may be justified as instances of ceremonial deism. Specifically, courts have suggested that religious government speech does not violate the Establishment Clause when it has lost any significant religious content;

when it merely acknowledges the importance of religion in the nation's past and present; and when it serves a valid secular purpose, such as solemnizing public occasions. None of these alternative justifications for ceremonial deism applies in this case.

1. The Statute's Attempt to Influence Individuals' Decision of Whether and When to Pray is Not Government Speech Devoid of 'Significant Religious Content'

Some courts have suggested that religious government speech may count as ceremonial deism where, unlike here, it has lost any significant religious content through rote repetition. For example, Justice Brennan distinguished a challenged nativity scene from examples of permissible forms of ceremonial deism as follows:

> I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Lynch, 465 U.S. at 716 (Brennan, J., dissenting). Similarly, Justice Brennan observed in *Marsh* that "'God Save the United States and this honorable Court,' 'In God We Trust,' [and] 'One Nation Under God' . . . are consistent with the Establishment Clause not because their import is *de minimis*, but because they have lost any true religious significance." 463 U.S. at 818. This Court employed

similar reasoning when considering the constitutionality of the Pledge of Allegiance. *See Sherman*, 980 F. 2d at 445-48.

Unlike the aforementioned permissible forms of ceremonial deism, section 119 is not mere government speech devoid of religious content. Rather, the statute mandates a government exhortation to engage in prayer, a quintessentially religious activity, and attempts to influence individuals' decisions about whether and when to pray. Section 119 therefore cannot be defended on these grounds as an instance of ceremonial deism.

2. The Statute is Not a Mere Acknowledgment of Religion's Historical Role, but an Explicit Encouragement of Religious Activity.

In other cases, courts have upheld government practices as constitutionally permissible ceremonial deism where the practices involve references to religion that merely acknowledge the importance of religion in our nation's past and present. *See, e.g., Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring) ("One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins."). In considering the constitutionality of the Pledge of Allegiance, this Court referenced a similar justification for the Pledge offered in dicta by Justice Brennan. *Sherman*, 980 F. 2d at 447, *quoting Abington School Dist. v. Schempp*, 374 U.S. 203, 303-04 (1963)

(Brennan, J., concurring) (the reference to "God" in the Pledge "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'").

Section 119, however, is neither a mere acknowledgment of the religious beliefs of many Americans, nor a mere acknowledgment of religion's historical role in American society. Rather, section 119 legislatively mandates the Government's annual exhortation to American citizens to engage in the religious practice of prayer on a specified date. In this sense, section 119 is entirely unlike any example of constitutionally permissible ceremonial deism that merely commemorates the role of religion in the nation's history.

The Supreme Court has stated that a government practice cannot constitute mere "acknowledgment" of religion where, as here, the practice "call[s] for religious action on the part of citizens." *McCreary*, 545 U.S. at 877 n. 24. Section 119 does precisely that. The statute therefore cannot be defended as a ceremonial deistic instance of mere "acknowledgment" of religion.

3. The National Day of Prayer Does Not Serve Any Secular Purpose.

The courts have also suggested that government religious practices may be condoned where God or religion is invoked or referenced for secular purposes, including the purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of

appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also id*. at 717 (Brennan, J., dissenting) ("[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge . . . ."). For example, some Justices have suggested in dicta that the announcement "God save the United States and this honorable Court" before Supreme Court proceedings is an instance of ceremonial deism meant to solemnize the occasion, not an unconstitutional call to engage in religious worship, and that the mention of "God" in the Pledge of Allegiance is meant to serve the secular purpose of intensifying citizens' patriotic exercise. *Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring). *See also Newdow v. Rio Linda Union School Dist.*, 597 F. 3d 1007, 1012 (9th Cir. 2010) (describing the Pledge of Allegiance as serving the predominant, secular purpose of instilling patriotism).

Unlike these examples, however, section 119 does not embody the mere reference of religious language to further a valid secular purpose. Rather, section 119 endorses and encourages prayer for its own sake, without furthering any secular purpose. As such, section 119 cannot be considered an example of constitutionally permissible ceremonial deism.

C. The Statute Fails Justice O'Connor's Modified Endorsement Test Specifically Applicable to Ceremonial Deism.

In her concurring opinion in *Elk Grove*, Justice O'Connor attempted to formulate a modified version of the endorsement test[7] specifically applicable to ceremonial deism. Even if this Court were to adopt Justice O'Connor's modified endorsement test in this case, section 119 would fail to meet that test.

Under Justice O'Connor's modified endorsement test, a religious reference or practice would qualify as constitutionally permissible ceremonial deism if a reasonable person found that it possessed four factors: (i) a long history and ubiquity, *id.* at 37 (the challenged practice "has been in place for a significant portion of the Nation's history" and has been "observed by enough persons that it can fairly be called ubiquitous"); (ii) the absence of worship or prayer, *id*. at 39; (iii) the absence of a reference to a particular religion, *id*. at 42; and (iv) minimal religious content, *id*.

[7] The usual version of the endorsement test courts frequently apply in Establishment Clause cases finds a government action invalid if it creates a perception in the mind of a reasonable observer that the government either endorses or disapproves of religion. *Lynch*, 465 U.S. at 668 (O'Connor, J., concurring).

Section 119 does not reference a particular religion by name.[8] The statute fails, however, to meet three of the four requirements of Justice O'Connor's modified endorsement test. For the reasons discussed in section (I)(A) above, *supra* pp. 8-13, the statute is not a form of ceremonial deism that has a long history and ubiquity. Nor can the statute properly be described as an instance of ceremonial deism in which there is an absence of worship or prayer, as it specifically seeks to encourage individuals to engage in prayer on a specified date. Likewise, for the reasons discussed in section (I)(B)(1) above, *supra* pp. 14-15, the statute cannot be described as an instance of ceremonial deism with minimal religious content. For these reasons, section 119 fails Justice O'Connor's modified endorsement test specifically applicable to ceremonial deism.

[8] Although section 119 does not reference a specific religion by name, it is formulated to encourage citizens to turn to a particular kind of deity. Specifically, the statute encourages citizens to turn "to God in prayer and meditation." 36 U.S.C. § 119. To the extent that the statute favors religious activity above the practices of the many religions that reject a monotheistic God (e.g., Buddhism, Hinduism, Native American religions, New Age, and Paganism), or forms of monotheistic belief that reject the concept of a God that responds to prayer (e.g., Deism), the statute arguably falls afoul of the modified endorsement test's requirement that the instance of ceremonial deism fail to reference a particular religion.

II. EXPANDING THE APPLICATION OF THE SUPREME COURT'S *SUI GENERIS* DECISION IN *MARSH* WOULD UNDERMINE CORE VALUES THE ESTABLISHMENT CLAUSE PROTECTS.

The Government and *amici* ask this Court to apply the analysis in *Marsh* to this case on the mere basis that the government practice at issue here purportedly has a long and unambiguous history. As discussed above, section 119's history can hardly be described as long or unambiguous. Just as importantly, however, expanding the scope of the Supreme Court's *sui generis* "historical longevity" analysis in *Marsh* would do great violence to the values the Establishment Clause seeks to protect. Moreover, it would call into question many of the legal system's longstanding Establishment Clause precedents.

As in *Marsh*, pivotal to the Government and *amici's* case is the notion that the government practice they purport to be at issue—here, the issuance of prayer proclamations—has existed since the nation's founding. The Court in *Marsh* noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. The Court further emphasized that Congress approved the Bill of Rights a mere three days after it voted to authorize the appointment of government-paid chaplains. *Id.* at 788. Based on this history, the Court concluded that the government practice at issue must be consistent with the Establishment Clause, as "[c]learly the men who wrote the First Amendment Religion Clauses

did not view paid legislative chaplains and opening prayers as a violation of that amendment." *Id.*

The Supreme Court's *sui generis* analysis in *Marsh* suffers from a number of flaws that strongly caution against extending it to this case. First, the analysis necessarily presupposes the validity of judging the scope of constitutional provisions by the specific practices of the Framers. This presupposition is deeply mistaken. It has been compared to the clearly erroneous belief that any action by a party to a contract must be consistent with the contract, which "would of course resolve many of the heretofore perplexing issues in contract law." *Id*. at 816 (Brennan, J., dissenting). Furthermore, even in the majority opinion in *Marsh*, the Court cautioned that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." 463 U.S. at 790.

Rather, "the early Congress's political actions" are "relevant" rather than "determinative . . . evidence of constitutional meaning." *Lee*, 505 U.S. 577 at 626 (Souter, J., concurring). The "history and ubiquity of a practice is relevant" to Establishment Clause analysis "because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring). However, where, as here, a longstanding practice retains its

religious significance and fails to acquire secular meaning, it may convey an unconstitutional message of endorsement of religion. *Id*.

Moreover, even if the First Congress supported legislative prayer and some of the early Presidents embraced the practice of proclaiming a national day of thanksgiving, it does not follow that they would have judged these practices constitutional if they were forced to seriously examine the issue. Indeed, James Madison later regretted both his issuance of a presidential proclamation of thanksgiving, *McCreary*, 545 U.S. at 879 n. 25, and his vote as a Congressman for congressional chaplains, *Marsh*, 463 U.S. at 815 (Brennan, J., dissenting). One constitutional scholar has argued that because early government favoritism toward religion was uncontroversial in an overwhelmingly Protestant country, it simply went unexamined. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 917-18 (1986).

For these reasons, Justice O'Connor observed that "[h]istorical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). Some scholars have argued in addition that the historical longevity of a practice may exacerbate an

Establishment Clause injury because "religious outsiders [must] tolerate these practices . . . with the awareness that those who share their religious beliefs have endured these practices for generations." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2164 (1996).

Moreover, the argument from historical longevity incorrectly assumes that the Framers intended their contemporary attitudes and practices to control future generations for all eternity. Instead of composing a detailed and specific civil code listing permissible and unacceptable practices, however, the Framers composed the Constitution in terms of "majestic generalities" the "broad purposes" of which must be applied by future generations to the issues of each age. *Marsh*, 463 U.S. at 816-17 (Brennan, J., dissenting).

The Supreme Court's frequent rejection of practices in which the Framers of the Bill of Rights and the Fourteenth Amendment routinely engaged demonstrates the danger of judging the constitutionality of government actions by their historical longevity. Such practices include, *inter alia*, gender discrimination, racial segregation, denial of trial by jury, certain forms of cruel and unusual punishment, and unreasonable searches and seizures. *Id.* As Justice Souter has noted, even "leaders who have drafted and voted for a text are eminently capable of violating their own rules." *Van Orden*, 545 U.S. at 726 (Souter, J., dissenting). For example, "the Congress that proposed the Fourteenth Amendment also enacted

laws that tolerated segregation," while "10 years after proposing the First Amendment, Congress enacted the Alien and Sedition Act, which indisputably violated our present understanding of the First Amendment." *Id*.

Reliance upon historical longevity to shield government practices from Establishment Clause scrutiny is equally problematic. As the Supreme Court has noted, reading the Establishment Clause to permit any practice in existence at the time of the Framers would mean that the government would be free to discriminate against all non-Christians, in direct contradiction of the courts' present understanding of the Religion Clauses:

> [H]istory shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."

McCreary County, 545 U.S. at 880; *see also Allegheny*, 492 U.S. at 590 ("Perhaps in the early days of the Republic [the establishment clause was] understood to protect only the diversity within Christianity.").

For each of these reasons, this Court should reject the Government and *amici's* misguided call to expand the Supreme Court's *sui generis* analysis in *Marsh* beyond the unique circumstances of that case.

III. CHANGES IN RELIGIOUS DEMOGRAPHICS UNDERCUT THE GOVERNMENT'S HEAVY RELIANCE UPON *MARSH*.

The Government and *amici* rely heavily upon the Supreme Court's holding in *Marsh*, which sanctioned state legislative prayer as a mere "tolerable acknowledgment of beliefs widely held" and a government practice with an "unambiguous and unbroken history." 46 U.S. at 792. To the extent that the Supreme Court's reasoning and holding in *Marsh* rest upon the uniformity of religious beliefs and practices within the nation, however, they are undercut by recent changes in the nation's religious demographics.

The Government's reliance on the reasoning in *Marsh* implicates the history and development of the nation's religious demographics in a number of ways. First, the Court's reasoning in *Marsh* rested in part on the challenged government practice's acknowledgment of "[religious] beliefs widely held" at that time throughout the nation. *Id*. Changes in American religious demographics undercut the notion that the belief in a monotheistic God that answers to prayer is "widely held."

Similarly, the Government and *amici* contend that section 119 is constitutionally permissible because the government practice it mandates is purportedly a mere recognition of the important role religion plays in public life. This argument also rests on the unstated and mistaken assumption that a God that listens to prayer, intervenes in human affairs, or grants blessings is significant to all

Americans. Demographic changes belie this assumption.

Third, some courts have sought to justify instances of ceremonial deism on the grounds that certain religious references reinforce citizens' sense of belonging in a common nation. *See, e.g., ACLU of Ohio v. Capitol Sq. Rev. & Advisory Bd.*, 243 F.3d 772, 777 (6th Cir. 2001) (*en banc*) (upholding the Ohio state motto, "With God All Things Are Possible," because "[l]ike the national motto, and the national anthem, and the pledge of allegiance, the Ohio motto is a symbol of a common identity. Such symbols . . . reenforc[e] the citizen's sense of membership in an identifiable state or nation."). Due to changes in religious demographics, government endorsement of religious references no longer unites, but divides the American populace along religious lines by reinforcing nonadherents' religious outsider status.

Finally, the Government and *amici's* argument that the alleged historical ubiquity of national prayer proclamations establishes their constitutionality ignores important demographic shifts since the time of the Founding.

In 1789, the United States was overwhelmingly Protestant, *Laycock* at 918, and government aid to Protestantism was rampant and uncontroversial, *id*. at 913. It is therefore unsurprising that many Framers and early Presidents did not heed the rights of non-Protestants or non-believers. Shifts in the United States'

religious demographics render misplaced the Government's and *amici's* reliance upon the alleged longevity and ubiquity of national prayer proclamations as proof of their constitutionality.

There may have been a time when all or nearly all citizens subscribed to Judeo-Christian religion, and when government endorsement of ceremonial deistic religious references could function to bind citizens to their nation and government. That time has long passed. Government endorsement or encouragement of some citizens' religious beliefs at the expense of others cannot reinforce a sense of national unity. Instead, encouragement of prayer to a monotheistic God that listens to prayer can only reinforce and reaffirm the "outsider" status of the many Americans who do not hold these particular religious beliefs. *See Lynch*, 465 U.S. at 668 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

According to polling data collected by Gallup, Inc., the percentage of Americans self-identifying as Christian has been dropping in recent decades. In 1948, when Gallup first began tracking Americans' religious identification, 91% of Americans identified themselves as Christian. Gallup, Inc., *This Easter, Smaller Percentage of Americans Are Christian* (April 10, 2009) (hereinafter "Gallup

2009").[9] In 1952, when Congress first passed legislation requiring the President to declare a National Day of Prayer, that percentage was approximately unchanged. By 1984, however, shortly after the Supreme Court decided *Marsh*, the percentage of Americans self-identifying as Christian had dropped to 85%. *Id.* By 2008, the percentage had fallen to 77%. *Id.* During the same period, the percentage of Americans self-identifying as Jewish hovered at approximately 2%. *Id.*

While the percentage of Americans who identify with Judeo-Christian religion has been falling, the percentage of Americans with no religion has been rising. In 1948, only 2% of Americans identified as having "no religion." *Id.* That percentage has increased significantly, from 8% in 1984 to 12% in 2008. *Id.* Today, the percentage of Americans having no religious identity stands at 16%. Gallup, Inc., *In U.S., Increasing Number Have No Religious Identity* (May 21, 2010).[10]

Likewise, significant numbers of Americans today identify with non-Judeo-Christian religions. In 1948, the percentage of Americans identifying with non-Judeo-Christian religions was close to 0%. Gallup 2009. Today, 7% of Americans identify with non-Judeo-Christian faiths. *Id.* According to recent

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[9] Available online at http://www.gallup.com/poll/117409/easter-smaller-percentage-americans-christian.aspx.

[10] Available online at http://www.gallup.com/poll/128276/Increasing-Number-No-Religious-Identity.aspx.

surveys, approximately 1.35 million American adults are Muslim; 1.96 million belong to Eastern Religions, including the Baha'i, Buddhist, Hindu, Shinto, Sikh, Taoist, or Zoroastrian traditions; 2.80 million belong to other nonmainstream religions, e.g., Druidism, Native American religions, New Age, Paganism, Rastafaria, Santeria, and Wicca.[11] In total, well over 40 million Americans are neither Christian nor Jewish.[12]

This significant shift in religious demographics undermines any notion that instances of ceremonial deism foster inclusiveness and social unity. Indeed, two scholars have observed that "[t]rends in religious demographics . . . suggest that Judeo-Christianity[13] can no longer plausibly claim to capture the

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[11] *See* Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey Summary Report (ARIS 2008)* 5, 23 (2009), available at http://livinginliminality.files.wordpress.com/ 2009/03/aris_report_2008.pdf (hereinafter "ARIS"); *see also Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey* 5 (2008), available at http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (hereinafter "Pew Survey").

[12] *See Aris* at 5. While 76 percent of adults surveyed identified as Christian and 1.2 percent identified as Jewish, 17.7 percent are neither Christian nor Jewish. Approximately 5.2 percent did not respond.

[13] Although Muslims, like Jews and Christians, worship a supreme being, they generally refer to their deity as "Allah," and not "God." *See, e.g.*, Chibli Mallat, *From Islamic to Middle Eastern Law, A Restatement of the Field (Part II)*, 52 Am. J. Comp. L. 209, 285 (2004) (noting that the name "Allah" is used to "set apart the Muslims' God from 'God' in any [other] great religious tradition"). To the extent that ceremonial deistic practices reference "God," those practices therefore effectively exclude Muslims.

beliefs of nearly all Americans, and, correspondingly, that it can no longer plausibly claim to function as a socially and politically unifying civil religion." Frederick Mark Gedicks and Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. Va. L. Rev. 275, 284 (2007).

To the extent that the Supreme Court's reasoning in *Marsh* depends upon the uniformity of the nation's religious beliefs and practices, that reasoning is rendered inapplicable by changes in the nation's religious demographics. For this reason, this Court should reject the Government's call to extend the Supreme Court's analysis in *Marsh* to this case.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 29(c)(5) AND RULE 32(a)

I hereby certify that the text of the accompanying Brief is composed in Times New Roman typeface, with 14-point type, and has 6,667 words and is in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b).

Dated October 7, 2010

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CERTIFICATE OF COMPLIANCE WITH RULE 31(e)

I hereby certify that that a digital version of this brief is available in electronic PDF and is being provided to the Court via upload through the Electronic Case Filing (ECF) system, in compliance with the requirements of Circuit Rule 31(e).

Dated October 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010, I electronically filed a copy of the foregoing *Amicus Curiae* Brief upon all counsel of record in this litigation via the ECF System for the Court of Appeals for the Seventh Circuit, as well as 2 hard copies via express mail to:

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CONSENT TO FILING OF AMICUS BRIEFS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., Plaintiffs-Appellees, v. BARACK OBAMA, President of the United States, et al., Defendants-Appellants.	No. 10-1973

CONSENT TO THE FILING OF AMICUS BRIEFS

The parties to this appeal hereby consent to the filing of amicus briefs by Americans United for Separation of Church and State, American Jewish Congress, American Humanist Association, Interfaith Alliance, Center for Inquiry, and Military Religious Foundation, in support of the appellees.

Dated this 18th day of August, 2010.

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